STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2014
v	No. 316000 Oakland Circuit Court
MARGO ELAINE MILTON, Defendant-Appellant.	LC No. 2012-240041-FC

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Margo Elaine Milton appeals as of right her jury trial conviction of armed robbery,[1] possession of a firearm during commission of a felony ("felony-firearm"),[2] and conspiracy to commit armed robbery.[3] Milton was sentenced to 8 to 20 years for armed robbery to be served consecutively to two years for the felony-firearm conviction, and to 8 to 20 years for conspiracy to commit armed robbery to be served concurrently to the terms for the armed robbery and felony-firearm convictions. We affirm in part and reverse in part.

Milton was charged in connection with the robbery of a CVS pharmacy located in Southfield where she was a supervisor. On appeal, Milton first argues that the trial court erred when it denied her motion for a new trial based on her allegation that defense counsel's assistance was ineffective because he failed to raise the defense of duress. We disagree. Appellate review of a trial court's decision to grant or deny a motion for a new trial is for an abuse of discretion.[4] "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes."[5] "[W]hether defense counsel performed ineffectively is

[1] MCL 750.529.

[2] MCL 750.227b.

[3] MCL 750.157a; MCL 750.529.

[4] *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

[5] *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law."[6]

"In order to obtain a new trial" based on a claim of ineffective assistance, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different."[7] "A defendant must also show that the result that did occur was fundamentally unfair or unreliable."[8] "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."[9]

> The defense of duress is successfully raised where a defendant presents evidence from which a jury could conclude: (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, (3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act, and (4) the defendant committed the act to avoid the threatened harm.[10]

"Once a defendant successfully raises the defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress."[11]

Milton argues that had defense counsel raised the defense of duress at trial, evidence would have been presented that she advised the police after the robbery that alleged co-conspirator Tremayne Thompson threatened injury or death to her, her family, and her co-workers. Milton asserts that she would have provided testimony consistent with, but more detailed than, the information contained in the Presentence Investigation Report (PSIR). The PSIR notes in relevant part that Thompson allegedly approached Milton before the robbery and told Milton that her father, "a prior drug addict, had owed him $80,000.00 and, if she did not help her [sic] rob her place of employment, 'her people would come up missing.' " Milton contends that the trial testimony of Thompson regarding letters he sent to Milton corroborates her assertion that Thompson made threats to her, and that other witnesses *may* have also provided testimony to corroborate her claim of duress. Milton's contentions, however, are unpersuasive. The threatening letter sent by Thompson to Milton was sent more than a year after the robbery occurred. Thus, such evidence would not support that "the fear or duress was

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[6] *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

[7] *Id*. at 51.

[8] *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

[9] *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation and quotation marks omitted).

[10] *People v Terry*, 224 Mich App 447; 453; 569 NW2d 641 (1997).

[11] *Id*. at 453-454.

operating upon the mind" of Milton at the time of the robbery.[12] Additionally, Thompson testified at trial that he did not threaten Milton before the robbery. Thus, Milton has failed to rebut the strong presumption that defense counsel's decision to argue that Milton was not involved in the robbery instead of raising the defense of duress was sound trial strategy.[13] Thus, a new trial is not warranted.

Milton next argues that counsel was ineffective for failing to investigate her father, Kenneth Milton, and Maharayah Brown as potential witnesses. Specifically, Milton claims that her father could have provided evidence to support her duress defense, and that Brown could have provided impeachment evidence relevant to Milton's felony-firearm conviction. We find that relief is not warranted. The law of the case "doctrine provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case."[14]

This same issue was previously raised before this Court by Milton in a motion for remand. In denying her motion for remand, this Court stated:

> [Milton] has failed to show that remand is appropriate for the trial court to reconsider its decision to deny [Milton's] motion for a new trial based on ineffective assistance of counsel. Although [Milton] has provided affidavits or statements from witnesses she believes could have supported an alternative defense than what trial counsel presented at trial, [Milton] has not addressed or shown that she can overcome the presumption that trial counsel rejected calling the witnesses for strategic reasons and that counsel otherwise pursued a valid trial strategy.[15]

Thus, pursuant to the law of the case doctrine, this argument must fail.

Milton also asserts that the evidence presented at trial was insufficient to support her conviction for felony-firearm under an aiding and abetting theory. We agree. "In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt."[16]

Milton was convicted of felony-firearm on an aiding and abetting theory. "[T]he correct test for aiding and abetting felony-firearm in Michigan is whether the defendant procures,

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[12] *Id*. at 453.

[13] *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

[14] *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

[15] *People v Milton*, unpublished order of the Court of Appeals, entered December 27, 2013 (Docket No. 316000).

[16] *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

counsels, aids, or abets in [another carrying or having possession of a firearm during the commission or attempted commission of a felony]."[17] Conviction of a defendant under this theory requires more than showing that the defendant "aided the commission or attempted commission of the underlying crimes[.]"[18] Rather, it requires

> proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement.[19]

It is not enough to show that the defendant "merely knew that his codefendant possessed a gun during the crime."[20] Additionally, conviction requires more than showing that the defendant "incidentally benefited from the principal's possession of the firearm" during the felony's commission.[21]

The prosecution argues that Milton joined Thompson in the parking lot to discuss the layout of the store and the placement of the security cameras, "which ensured that Thompson could successfully enter with the gun, and use the gun to carry out the armed robbery with a limited risk of being identified." The prosecution, however, offered no admissible evidence at trial from which it could be inferred that Milton encouraged Thompson to use a gun during the commission of the robbery. Although Thompson testified at the preliminary examination—over Milton's hearsay objection—that Brown said he obtained the gun from Milton, when the prosecution pursued the same line of questioning at trial, the court sustained Milton's objection and no such evidence was presented. The totality of the evidence presented to the jury in that regard was that Thompson entered the CVS with a .45 caliber handgun that he had obtained from Brown. The fact that Milton conspired with Thompson and others to commit the robbery and received a percentage of the proceeds does no more than prove that she aided the commission of the underlying robbery, and benefitted from Thompson's possession of a gun during the robbery. Thus, reversal of Milton's conviction of felony-firearm is warranted.

Finally, Milton argues that offense variable (OV) 8 was erroneously scored. We disagree. A trial court's scoring of the sentencing guidelines is "reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are

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[17] *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004) (citation and internal quotation marks omitted).

[18] *Id*.

[19] *Id*. at 70-71.

[20] *People v McGuffey*, 251 Mich App 155, 158; 649 NW2d 801 (2002).

[21] *Moore*, 470 Mich at 70 n 18.

adequate to satisfy the scoring conditions prescribed by statute . . . is a question of statutory interpretation" that we review de novo.[22]

OV 8 of the sentencing guidelines addresses "victim asportation or captivity"[23] and applies to "crimes against a person."[24] Milton was assessed 15 points for OV 8. Under OV 8, a court must assess 15 points where "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense."[25] "A place of greater danger includes an isolated location where criminal activities might avoid detection,"[26] and each person who was placed in danger of injury or loss of life should be counted as a victim.[27] Asportation, while not requiring force, does require some movement of the victim beyond that "incidental to committing [the] underlying offense."[28]

During the robbery, Thompson moved the two victims from the public space behind the front counter (where they could be viewed by anyone driving or walking by), to the back office (where they could not be seen). As the victims were moved to "an isolated location where criminal activities might avoid detection,"[29] the scoring of OV 8 was proper and there was no error by the trial court.

We affirm the trial court's denial of Milton's motion for a new trial, but reverse Milton's conviction for felony-firearm and remand the matter to the trial court for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot

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[22] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[23] MCL 777.38.

[24] MCL 777.22(1).

[25] MCL 777.38(1)(a).

[26] *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013).

[27] MCL 777.38(2)(a).

[28] *Dillard*, 303 Mich App at 379 (internal quotation marks and citation omitted).

[29] *Id*.